

The COVID-19 Conundrum How to Navigate the Competing Federal and Florida COVID-19 Vaccine Laws

By: David Kalteux, FordHarrison LLP

Executive Summary:

“Damned if you do, damned if you don’t.” This is how many Florida private employers feel right now given the conflicting federal regulations and Florida’s legislation concerning COVID-19 vaccine mandates. The feeling is understandable considering the federal government recently issued a new rule requiring private employers with 100 or more employees to implement COVID-19 vaccine mandates for their employees. Less than one week later, Florida proposed legislation prohibiting employers from implementing mandatory vaccine policies, which Governor Ron DeSantis signed on November 18, 2021. The new Florida law is directly at odds with the federal regulations. This article will walk employers through how to handle this COVID-19 catch 22.

OSHA Vaccine Mandate for Private Employers

On November 4, 2021, the Department of Labor’s Occupational Safety and Health Administration (OSHA) issued an Emergency Temporary Standard (ETS) requiring all employers with 100 or more employees to implement a mandatory vaccine policy. Covered employers were required to comply with the majority of the requirements by December 5, 2021, and the testing requirements by January 4, 2022. More than two dozen states, including Florida, as well as a number of businesses, industry groups, and religious organizations, have sued to block the ETS calling it an abuse of government power. This issue is expected to eventually be decided by the U.S. Supreme Court. The U.S. Court of Appeals for the Fifth Circuit recently ordered OSHA to take no steps to implement or enforce the ETS until further court ordered. On November 18, 2021, OSHA suspended enforcement of the ETS to let the legal process considering its enforceability play out.

Florida Legislation Limiting Vaccine Mandates

On October 21, 2021, Florida Governor Ron DeSantis called on the Florida Legislature to pass a law combatting federal vaccine mandates and requested a special legislative session rather than waiting until the normal legislative sessions resume next year. The Florida Legislature proposed such legislation (SB 2B/HB 1B), which was approved during a special legislative session and enacted by Governor DeSantis on November 18, 2021 (“Florida’s Law”). Essentially, the new Florida law prohibits private employers from imposing COVID-19 vaccination requirements for certain employees, requires employers to exempt certain employees from vaccination requirements, provides a complaint mechanism for employees terminated for refusing to comply with a vaccine

mandate, and imposes required fines for any employer who violates the law. Florida's law also prohibits public employers from imposing COVID-19 vaccine mandates, without exception.

Federal ETS Regulations v. Florida's Law

The ETS establishes minimum vaccination, vaccination verification, face covering, and testing requirements to address the grave danger of COVID-19 in the workplace. The ETS provides as follows:

- Requires employers to establish, implement, and enforce a written mandatory vaccination policy.
- Employers can choose to provide employees the option of weekly testing. Employers are not required to offer this option or pay for the cost of testing if they do offer it.
- The ETS only applies to private employers with 100 or more employees.
- The ETS does not apply to employees who do not report to a workplace where other individuals, such as co-workers or customers are present; who work only from home; or who work exclusively outdoors.
- Employers must require employees who are not vaccinated to wear a face-covering when indoors and occupying a vehicle with another person for work purposes with limited exceptions. Employers are not required to pay for the face-coverings or other personal protective equipment (PPE).
- Employers are required to obtain each employee's vaccination status, proof of vaccination (if vaccinated), and maintain records of such, and make them available upon request from the employee, employee's representative, or OSHA.
- Noncompliance will subject employers to fines or other penalties.

Florida's Law prohibits private employers from imposing a COVID-19 vaccine mandate for employees unless certain individual exemptions are made available. Florida's Law provides:

- Employers cannot impose a COVID-19 mandatory vaccine policy unless the employer provides individual exemptions that allow an employee to opt out of such requirement.
- Employers must allow an employee to opt out for (1) medical reasons (including but not limited to pregnancy); (2) religious reasons; (3) COVID-19 immunity; (4) periodic testing; and (5) PPE.
 - Medical reasons – to claim an exemption based on medical reasons, including “pregnancy or anticipated pregnancy”, the employee must provide the employer an exemption statement signed by a physician or physician assistant, who has examined the employee, which states that the COVID-19 vaccination is not in the best medical interests of the employee.

FORDHARRISON

- Religious reasons – to claim an exemption based on religious reasons, the employee must present to the employer an exemption statement indicating the employee declines the vaccination because of a sincerely held religious belief.
- COVID-19 immunity – the employee must provide the employer “an exemption statement demonstrating competent medical evidence that the employee has immunity to COVID-19, documented by valid lab test performed on the employee.”
- Periodic testing – requires an exemption statement wherein the employee agrees to comply with regular testing.
- PPE – personal protective equipment (masks); the employee must provide a statement indicating employee agrees to comply with employer’s reasonable written requirement to use PPE when in the presence of other employee or persons.
- Employers are required to pay for periodic testing and/or personal protective equipment.
- Applies to **all** private employers regardless of employee count.
- Contains a complaint mechanism for employees who are improperly denied an exemption from a mandatory vaccine policy or terminated for not obtaining the vaccine.
- Employers cannot implement a policy that prevents an employee from obtaining a vaccine.
- Non-compliance will subject employers to fines and/or other penalties.

Which Law Should Employers Follow?

Unfortunately, this is not a simple answer. The U.S. Constitution declares that federal law is the “supreme law of the land.” As a result, federal law will usually supersede (a.k.a. preempt) state law when the laws directly contradict each other. This is an easy determination when federal law specifically preempts an existing state law; however, that is not the case here considering Florida’s Law was not even a bill yet when the ETS was issued. In a case where Congress does not preempt a specific state law, if challenged, the courts are tasked with determining whether a state and federal law directly conflict. Another wrinkle is that the DOL – the agency tasked with enforcing federal labor laws including the ETS – instructs employers and employees to follow the law that provides the highest standard of protection to employees. Determining which law offers the “highest standard of protection” to employees will be a divisive question – pitting employee safety in the workplace vs. an employee’s freedom to choose his/her medical treatment. There are steps an employer can take to avoid risk, even in the midst of uncertainty:

1. First Focus on Compliance with Florida’s Law. The ETS is currently in a holding pattern and employers will likely not have to comply with the previously set deadlines of December 5, 2021 and January 4, 2022. Conversely, Florida’s Law has been passed and takes effect immediately. Employers with mandatory vaccine policies need to adjust their policies to permit the listed exemptions

FORDHARRISON

mentioned above. Employers without mandatory vaccine policies likely will not have to make significant changes but should still make sure their current practices are compliant. For example, if an employer requires its unvaccinated employees to submit to routine testing or PPE, the employer must make sure those requirements are reasonable and needs to pay for those protective measures.

2. Continue Preparing for Compliance with the ETS. Employers should prepare as if the ETS were to survive in the courts. The DOL has issued a statement stating that the ETS will supersede any state laws that prevent businesses from implementing the requirements on vaccination and testing, but as discussed above, that is not clear. Employers should continue gathering the necessary documents and information needed from their employees in anticipation of the ETS going into effect. Florida's Law does not prohibit employers from taking these actions.
3. Do Everything Possible to Comply with Both Laws. If both laws are in effect at the same time (which is very possible), employers must familiarize themselves with the nuances of the two competing laws and do everything possible to comply with both of them. It sounds obvious, but the more of each law the employer can comply with, the less chance there is of being found in noncompliance and subjected to financial penalties. For example, if an employer implements a mandatory vaccine policy, provides unvaccinated employees with the option to undergo regular testing, requires the employee to wear PPE when near others, and the employer pays for the testing, the employer is complying entirely with the ETS and a majority of Florida's Law. This is not a perfect solution as the Florida Law does require exemptions that would run afoul of the ETS (the COVID-19 immunity and PPE exemptions).
4. Only Apply the ETS to Covered Employees. Again, assuming both laws are in effect at the same time, an easy way to decrease the risk of noncompliance is to avoid applying the ETS to employees not covered by the rule. Florida's Law covers all private employers' employees while the ETS does not. For example, if an employee works exclusively from home or outside, there is no need to require him/her to get the vaccine. If an employer insists, then the employer can follow the Law and make sure to provide the required exemptions.
5. Don't Forget to Comply with Employment Discrimination Laws. Both the ETS and Florida's Law provide for exceptions from the vaccine requirement for medical or religious reasons. If an employer implements a mandatory vaccine policy, the employer must ensure compliance with the Americans with Disabilities Act Amendment Act of 2008 (ADAAA), Title VII of the Civil Rights Act of 1990 (Title VII), the Genetic Information Nondiscrimination Act (GINA), and Florida Civil Rights Act of 1992 (FCRA). An employee's request for an exemption from a mandatory vaccine policy based on disability, pregnancy, or religious reasons should be treated the same as any other request for accommodation. The

FORDHARRISON

employer must engage in the interactive process with the employee to determine whether there is a reasonable accommodation available that does not impose an undue hardship on the company. Employers can request documentation and additional information to confirm an employee's need for a medical exemption. Employers need to make sure they treat employees in a fair and consistent manner when responding to such requests.

This is an incredibly fluid situation. Unfortunately, there is no perfect formula for employers to follow to comply with both the ETS and Florida Law. Each employer's situation is different and compliance measures and strategy for the competing laws vary and must be determined on a case-by-case basis.

If you have any questions regarding this article, please contact the author, David Kalteux, dkalteux@fordharrison.com, or any member of FordHarrison's Coronavirus Taskforce.